M Rathakrishnan a/l Muthu v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–12–01 OF 2012
LINTON ALBERT, MOHTARUDIN BAKI AND ZAWAWI SALLEH JJCA
17 JUNE 2013

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Criminal Procedure — Trial — Close of prosecution case — Whether trial judge wrong to have considered accused's probable defence in deciding if prima facie case made out — Whether judge duty-bound to evaluate and scrutinise evidence objectively from all angles — Whether circumstantial evidence pointed solely to accused as murderer

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The appellant was sentenced to death by the High Court for murdering his wife ('the deceased'). The murder took place at the house of the deceased's younger brother ('SP11'). SP11's neighbour, SP7, saw the appellant screaming and running away from SP11's house and finally sitting on the main road not far away. When SP7 enquired, the appellant told him three men had broken into the house and attempted to rape the deceased but since he could not overpower them he ran out of the house to seek help. When SP7 went into the house to check he could not find any intruders but found the deceased lying in a pool of blood in one of the rooms. An autopsy showed she had died of stab wounds to the neck. The sole issue raised by the appellant in his instant appeal against conviction and sentence was that the trial judge erred in considering the possibility of the defence's case at the close of the prosecution's case when he should have confined his evaluation to only the prosecution's evidence. As such, he said, the finding of a prima facie case against him was perverse.

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Held, dismissing the appeal:

(1) The trial judge directed himself correctly in law when he considered the appellant's probable defence in deciding whether the prosecution had made out a prima facie case. The circumstantial evidence pointed towards the appellant's guilt. At the conclusion of the prosecution's case, the existence of the three 'intruders' remained a remote possibility that could not create a gap in the prosecution's case (see paras 20–21).

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(2) In considering the appellant's probable defence, the trial judge found there was no sign the house had been broken into or that it had been ransacked. The appellant was last seen with the deceased, her DNA profile was found on him, SP7 and SP10 who went into the house to check did not see anyone escaping from the house and all available evidence connected the appellant to the crime (see para 18).

I

(3) The maximum evaluation principle at the close of the prosecution case imposed upon the trial judge the duty to scrutinise and evaluate the evidence objectively and from all angles. The evidence of the prosecution's witnesses could not be accepted at face value but had to be scrutinised properly and not perfunctionary or cursorily and when a set of facts was capable of giving rise to two or more inferences, the inference most favourable to the accused ought to be drawn. It was incumbent upon the trial judge to consider any evidence fairly open to the accused for an acquittal such as the probable defence that could be elicited from the prosecution's witnesses (see para 17).

(4) The appellant's evidence, when critically tested against the proved facts of the case, did not inspire confidence and failed to cast any reasonable doubt on the prosecution's case. The damning evidence of SP4 (the medical officer) that the appellant admitted to him that the scratch marks on his body were caused by the deceased was not challenged nor did the appellant explain how he got them. The only reasonable inference was that he must have sustained the injuries in a struggle with the deceased. The appellant's unreasonable behaviour of staying behind whilst the other neighbours went into the house to check also greatly affected the probability of his version of the case (see paras 23–25).

(5) Considering and weighing all the evidence, the court was satisfied the chain of circumstantial evidence was complete and did not leave any reasonable ground for a conclusion that was consistent with the appellant's innocence. The chain of circumstances was such as to show that in all probability the murder was committed by the appellant and by no one else (see para 27).

[Bahasa Malaysia summary

Perayu telah dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh isterinya ('si mati'). Pembunuhan itu berlaku di rumah adik lelaki si mati ('SP11'). Jiran SP11, SP7, melihat perayu menjerit dan melarikan diri dari rumah SP11 dan akhirnya duduk di jalan utama tidak jauh daripada situ. Apabila SP7 bertanya, perayu memberitahunya tiga lelaki telah pecah masuk ke dalam rumah dan cuba merogol si mati tetapi kerana dia tidak dapat melawan mereka dia berlari keluar dari rumah untuk mendapatkan bantuan. Apabila SP7 masuk ke dalam rumah untuk memeriksa kejadian dia tidak dapat mencari penceroboh-penceroboh itu tetapi mendapati si mati terbaring dalam kolam darah di dalam salah satu bilik. Bedah siasat menunjukkan dia telah meninggal dunia akibat kesan tikaman ke leher. Satu-satunya isu yang dibangkitkan oleh perayu dalam rayuan ini terhadap sabitan dan hukuman adalah bahawa hakim perbicaraan terkhilaf dalam mempertimbangkan kemungkinan kes pembelaan di penutup kes pendakwaan di mana beliau sepatutnya mengehadkan penilaiannya hanya kepada bukti-bukti

pendakwaan. Oleh itu, dia mengatakan, penemuan kes prima facie terhadapnya adalah bertentangan. A

Diputuskan, menolak rayuan:

(1) Hakim perbicaraan mengarahkan dirinya sendiri dengan betul dari segi undang-undang apabila beliau mempertimbangkan pembelaan perayu yang mungkin dalam memutuskan sama ada pihak pendakwaan telah membuat kes prima facie. Bukti mengikut keadaan menunjuk ke arah kesalahan perayu. Pada akhir kes pendakwaan, kewujudan ketiga-tiga 'penceroboh' kekal sebagai kemungkinan terpencil yang tidak dapat menimbulkan jurang dalam kes pendakwaan (lihat perenggan 20–21). B C

(2) Dalam mempertimbangkan pembelaan perayu yang mungkin, hakim mendapati tidak ada tanda rumah telah dipecah masuk atau ia telah digeledah. Perayu adalah orang terakhir dilihat bersama si mati, profil DNA si mati telah didapati padanya, SP7 dan SP10 yang masuk ke dalam rumah untuk memeriksa tidak melihat sesiapa melarikan diri dari rumah dan semua bukti yang ada mengaitkan perayu kepada jenayah itu (lihat perenggan 18). D

(3) Prinsip penilaian maksimum pada penutup kes pendakwaan mengenakan kewajipan untuk meneliti dan menilai bukti secara objektif dan dari semua sudut ke atas hakim perbicaraan. Keterangan saksi-saksi pendakwaan tidak dapat diterima pada dasarnya tetapi terpaksa diteliti dengan betul dan bukan tanpa bersungguh-sungguh atau sepintas lalu sahaja dan apabila satu set fakta mampu menimbulkan dua atau lebih kesimpulan itu, kesimpulan yang paling baik kepada tertuduh sepatutnya diambil. Ia adalah penting bagi hakim untuk mempertimbangkan apa-apa keterangan yang agak terbuka kepada tertuduh untuk pembebasan seperti pembelaan yang mungkin yang boleh diperoleh daripada saksi-saksi pendakwaan (lihat perenggan 17). E F G

(4) Keterangan perayu, apabila diuji secara kritikal terhadap fakta-fakta yang membuktikan kes itu, tidak memberi keyakinan dan gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Bukti memberatkan daripada SP4 (pegawai perubatan) bahawa perayu mengaku kepadanya yang tanda calar pada badannya adalah disebabkan oleh si mati tidak disangkal juga perayu tidak menjelaskan bagaimana dia mendapatnya. Satu-satunya kesimpulan yang munasabah adalah bahawa dia mengalami kecederaan itu semasa bergelut dengan si mati. Tingkah laku yang tidak munasabah perayu yang tinggal di belakang manakala jiran yang lain masuk ke dalam rumah untuk memeriksa juga banyak memberi kesan kepada kebarangkalian versinya mengenai kes (lihat perenggan 23–25). H I

(5) Setelah mengambil kira dan menimbang semua keterangan, mahkamah

A itu berpuas hati rantaian keterangan mengikut keadaan adalah lengkap dan tidak meninggalkan apa-apa alasan munasabah untuk kesimpulan yang konsisten dengan ketidakbersalahan perayu. Rantaian keadaan itu seperti menunjukkan bahawa dalam semua kebarangkalian pembunuhan itu dilakukan oleh perayu dan tiada sesiapa yang lain (lihat
B perenggan 27).]

Notes

For cases on close of prosecution case, see 5(2) *Mallal's Digest* (4th Ed, 2012
C Reissue) paras 5227–5297.

Cases referred to

Chan Chor Shuh v PP [2003] 2 MLJ 26; [2003] 1 CLJ 501, CA (refd)

Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130, FC (refd)

D *Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Penal Code s 302

E **Appeal from**: Criminal Trial No 45B-04 of 2009 (High Court, Taiping)

Singaravadivel a/l V Singaram (Hari Krishnan with him) (Liew, Julia Tun & Hari) for the appellant.

Ahmed bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the
F *respondent.*

Zawawi Salleh JCA (delivering judgment of the court):

THE ANTECEDENTS

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[1] This is an appeal against the judgment of the High Court, Taiping, convicting the appellant for one count of murder, for which he was sentenced to the mandatory death penalty as prescribed under s 302 of the Penal Code.

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[2] We have heard learned counsel for the appellant and learned deputy public prosecutor. We have scrutinised the entire evidence adduced before the High Court. We have found no merits in the appeal. Accordingly, we unanimously dismissed the appeal and affirmed the conviction and sentence
I passed by the High Court.

THE CHARGE

[3] The charge against the appellant reads as follows:

Bahawa kamu pada 13 Jun 2009 jam lebih kurang 9.00 malam di rumah No 28, Jalan 7, Taman Kamunting Maju, Kamunting, di dalam Daerah Larut Matang, di dalam Negeri Perak, telah melakukan satu pembunuhan yang menyebabkan kematian ke atas Kannamah a/p Munisamy (KP: 740703–10–5786). Dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen yang sama.

THE FACTS OF THE CASE

[4] The case of the prosecution reveals that the murder took place at Vasu Devan's (SP11) house, who is the younger brother of the deceased. On 13 June 2009, at about 9.15pm, Narayanan a/l Kannan ('SP7'), a neighbour of SP11, heard someone screaming for help. He looked out from his house and saw the appellant running towards the main road while screaming, before finally sitting on the road. SP7 went to the appellant and inquired as to the reasons of his shouting, in which the appellant answered: 'pencuri telah masuk ke rumahnya'.

[5] Both SP7 and Vasudevan a/l Munisamy ('SP10') assisted the appellant. SP10 went to the back of house to stand guard as a precautionary measure preventing the thief from escaping, while SP7 went inside the house through the back door which he found to be opened. The appellant remained at the same spot.

[6] SP7 saw a drop of blood outside the third room. He entered the room and saw the deceased lying on the floor (face down) in a pool of blood. SP7 then came out of the house and told his wife to cover the deceased's body with a piece of cloth, in which she did.

[7] Throughout the entire ordeal, the appellant held himself somewhat aloof from the rest. SP7 delivered the news to the appellant. Both SP7 and SP11, together with the appellant, returned to the house. SP7 asked the appellant what exactly happened and the appellant informed him that three men came into the house attempting to rape his wife.

[8] SP7 then reported the matter to the authorities.

[9] The autopsy of the deceased's body was conducted by Dr Mohammad Shafie bin Othman (SP8). The doctor concluded that the deceased's cause of death is 'stab wounds to the neck'.

THE DEFENCE'S CASE

[10] The gist of the appellant's defence is that on 13 June 2009, after work, he went to SP11's house to fetch his wife ('the deceased') home. The couple was

chatting in the house and three Indian men came looking for SP11. They entered into the house through the back door. The deceased informed them that her brother had gone to Ipoh to attend a wedding.

[11] One man then slapped the deceased and accused her for lying. The appellant then asked the man why he assaults the deceased. The man then pushed the appellant to the floor. The couple shouted for help. Another man scratched the appellant using a knife and warned him not to interfere.

[12] The appellant then ran out of the house to seek help from his neighbours. SP7 and SP10 came to his aid. SP7 entered the house and SP10 was waiting outside the house. SP7 later came out and asked his wife to enter.

[13] SP7's wife then came out of the house crying and told SP7 that the deceased had passed away. The appellant then went inside the house and held the deceased while crying. SP7 also went inside the house with the appellant and he told SP7 that three men broke into the house and tried to rape the deceased.

THE APPELLANT'S APPEAL

[14] Before this court, the appellant only raised a lone issue to challenge the impugned decision. The single issue reads as follows:

> Whether the learned trial judge misdirected himself when his Lordship took into consideration irrelevant factors when deciding that the prosecution had made out a prima facie case.

[15] Learned counsel for the appellant complained that the learned trial judge misdirected himself when His Lordship considered the possibility of the appellant's defence at the conclusion of the prosecution's case. He contended that the evaluation of evidence at that stage should only be confined to the prosecution witnesses only.

[16] Before we embark into the merits of counsel's argument, the relevant portion of the learned trial judge's judgment is reproduced as follows:

> 6.2.5. Having considered the evidence adduced by the prosecution, I am satisfied that the circumstantial evidence adduced is over whelming in that all this evidence drives the Court to the irresistible conclusion that it was the accused who had stabbed the neck of the deceased on the night in question based on the following grounds:
>
> (i) The accused was last seen with the deceased shortly before the incident ie about 9pm on 13 June 2009.

(ii) The allegation by the accused that thieves had entered the house or 3 male persons trying to rape the wife is highly unbelievable for the following reasons:

a. There was no sign of the house being broken into;

b. All the things in the house were intact including some jewelleries recovered from the house;

c. The back gate of the house was locked and it was difficult for the intruders, if any, to have jumped over the gate within a short span of time;

d. The dog reared by SP10 was in the house and no one had heard the dog's barking on the night in question.

(iii) ….

(iv) The accused also failed to complain to the arresting officer that the deceased was stabbed by the three intruders when he was arrested in the house on the night in question.

(v) The conduct of the accused for not following SP7 into house to find out what happened to the wife was highly suspicious of his defence that there were thieves in the house trying to rape the wife.

(See pp 29–31, Appeal Record, Vol 1.)

[17] With respect, the complaint by learned counsel is plainly misconceived. It is trite that the maximum evaluation principle imposes upon the trial judge, at the close of the case for the prosecution, the duty to scrutinize and evaluate the evidence objectively and from all angles. The evidence of prosecution witnesses must not be accepted at face value but it has to be scrutinized properly and not perfunctionary, cursorily or superficially; and when a set of facts is capable to give rise to two or more inferences, the inference most favarouble to the accused ought to be drawn. It is also incumbent for trial judge to consider any evidence which fairly open to the accused being acquitted such as the probable defence that could be elicited from the prosecution witnesses (see *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; [2003] 1 CLJ 501, *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130).

[18] It is not disputed that SP7 had testified (during examination-in-chief) that the appellant had first informed him that thieves had entered into the house. When SP7 inquired further, the appellant said that three men entered into the house and attempted to rape the deceased. In considering the probable defence of the appellant, the learned trial judge found that there was no sign that the house was broken into and the house was not ransacked. The appellant was last seen with the deceased. Her death was due to neck injuries. According to SP8, the pathologist, the knife ('exh P11C') matched the description of the murder weapon. The deceased's DNA profile was also found on the appellant.

SP7 and SP10 who both went to check on the house did not see anyone escaping from the house. The available evidence connected the appellant to the alleged murder.

[19] As regards to the issue of the finger prints found at the crime scene, the learned trial judge held that lack of fingerprint evidence had not caused any reasonable doubt on the prosecution's case.

[20] We are in total agreement with the learned trial judge. Taking in totality the circumstantial evidence adduced, it points towards the guilt of the appellant. At the conclusion of the prosecution's case, the existence of the three men remained a remote possibility that could not create a gap in the prosecution's case.

[21] In the circumstances of the case, we are satisfied that the learned trial judge had directed himself correctly in law when he considered the probable defence of the appellant in deciding whether the prosecution had made out a prima facie case.

THE EVALUATION OF DEFENCE CASE

[22] In essence, the defence raised by the appellant was that the alleged murder was committed by the three unknown men.

[23] The appellant's evidence, when critically tested against the proved facts of the case, did not inspire confidence and failed to cast any reasonable doubt on the prosecution's case. Our reasons are as follows:

(a) Had there been any intruders in the house, it would be difficult for them to escape from the back gate as it was locked and the fencing was high;

(b) No traces of foot print were found next to the back gate to suggest the presence of any intruders in the house;

(c) SP7 and SP10 both confirmed that no one escape from the house when they went to check on it;

(d) The appellant stated that when SP7 told him that the deceased had died, he went inside and held his wife. That was the reason why the deceased's DNA profile was found on his nail sampling and his long pants. However, both SP7 and SP10 did not see the appellant held his wife. The defence was also not suggested to both SP7 and SP10 who were together with the appellant. Further, there was no evidence to suggest that the deceased's body was moved after SP7's wife covered the corpse with a piece of cloth.

[24] Another damning evidence against the appellant was the evidence of SP4, the medical officer who first attended to the appellant. SP4 testified that when he was treating the appellant and the appellant confirmed that the scratched marks were caused by the deceased. This vital piece of evidence was not challenged. It is trite that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). The appellant also did not attempt to explain how he sustained such injuries. The only reasonable inference that could be drawn from it was the appellant sustained the laceration wounds due to a struggle or fight with the deceased.

[25] Another issue to be addressed is the appellant's unreasonable behaviour. Based upon appellant's narrative, he could not protect his wife because the three men were better built than him. However, when both SP7 and SP10 went into the house to check on the deceased and to fight the thieves, the appellant choose to stay behind. The above conduct has greatly affected the probability of the appellant's version of the case. Any reasonable husband would surely follow SP7 and SP10 into the house to fight the thieves or at the very least to find out what had happened to his wife.

[26] Based on the conspectus of the evidence, we cannot find any fault with the reasoning and conclusion of the learned trial judge. We are satisfied that the appellant's guilt was proved beyond reasonable doubt.

[27] Before we conclude, we must mention, lest we be accused of an oversight, we are aware that the evidence adduced by the prosecution in this instant case is wholly circumstantial in nature. After considering and weighing the evidence as a whole, we are fully satisfied that the chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances in the case is such as to show that within all human probability the murder was committed by the appellant and none else.

[28] All told, we found no merits in this appeal. The appellant was rightly convicted and sentenced. In the result, we dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

Appeal dismissed.

Reported by Ashok Kumar